

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MARVEL CHARACTERS, INC.,

Plaintiff and Counterclaim-Defendant,

v.

PATRICK S. DITKO, in his capacity as
Administrator of the Estate of Stephen J.
Ditko,

Defendant and Counterclaimant.

Case No.: 1:21-cv-7959-LAK

Hon. Lewis A. Kaplan

**DECLARATION OF MARC
TOBEROFF IN RESPONSE TO
MARVEL CHARACTERS INC.'S
LOCAL RULE 56.1 STATEMENT OF
MATERIAL FACTS**

PATRICK S. DITKO, in his capacity as
Administrator of the Estate of Stephen J.
Ditko,

Counterclaimant,

v.

MARVEL CHARACTERS, INC. and DOES
1-10, inclusive,

Counterclaim-Defendants.

I, Marc Toberoff, declare as follows:

1. I am counsel for Defendant Patrick S. Ditko (“Defendant”) and a member of the Bar of this Court. I submit this declaration based on my personal knowledge and review of the documents referenced herein. If called and sworn as a witness, I could and would testify competently thereto. In response to Marvel Characters Inc.’s Local Rule 56.1 Statement, I state as follows:

2. Attached hereto as **Exhibit 1** is a true and correct copy of the Expert Report of Mark Evanier (Supplemented).

3. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts (pages 1-3, 7, 58-59, 51-52, 71-74, 76, 79-80, 100-105) from the Transcript of Lawrence Lieber’s January 7, 2011 Deposition.

4. Attached hereto as **Exhibit 3** is a coversheet in place of the Transcript of John V. Romita’s October 21, 2010 Deposition, which was designated “Confidential” by Marvel Characters, Inc. (“Marvel”), and is being filed under seal.

5. Attached hereto as **Exhibit 4** is a coversheet in place of the Transcript of Stan Lee’s May 13, 2010 Deposition, which was designated “Confidential” by Marvel and is being filed under seal.

6. Attached hereto as **Exhibit 5** is a coversheet in place of the Transcript of Stan Lee’s December 8, 2010 Deposition, which was designated “Confidential” by Marvel and is being filed under seal.

7. Attached hereto as **Exhibit 6** is a true and correct copy of excerpts (pages 1-2, 30-31, 36, 82, 200, 202) from the Transcript of Roy Thomas’s October 26, 2010 Deposition.

8. Attached hereto as **Exhibit 7** is a true and correct copy of excerpts (pages 207-209, 223-225, 262-264, 273-274, 277) from the Transcript of Roy Thomas’s October 27, 2010

Deposition.

9. Attached hereto as **Exhibit 8** is a true and correct copy of the Declaration of Joe Sinnott in Support of Defendants' Motion for Summary Judgment and Defendants' Opposition to Plaintiffs' Motion for Summary Judgment dated March 21, 2011.

10. Attached hereto as **Exhibit 9** is a true and correct copy of the Declaration of James F. Steranko in Support of Defendants' Motion for Summary Judgment and Defendants' Opposition to Plaintiffs' Motion for Summary Judgment dated March 24, 2011.

11. Attached hereto as **Exhibit 10** is a true and correct copy of the Declaration of Richard Ayers in Support of Defendants' Motion for Summary Judgment and Defendants' Opposition to Plaintiffs' Motion for Summary Judgment dated March 25, 2011.

12. Attached hereto as **Exhibit 11** is a coversheet in place of the Confidential Declaration of Gene Colan in Support of Defendants' Motion for Summary Judgment and Defendants' Opposition to Plaintiffs' Motion for Summary Judgment dated March 22, 2011, which was designated "Confidential" and is being filed under seal.

13. Attached hereto as **Exhibit 12** is a true and correct copy of the Declaration of Mark Evanier dated March 25, 2011.

14. Attached hereto as **Exhibit 13** is a true and correct copy of the Declaration of Neal Adams in Support of Defendants' Motion for Summary Judgment and Defendants' Opposition to Plaintiffs' Motion for Summary Judgment dated March 24, 2010.

15. Attached hereto as **Exhibit 14** is a true and correct copy of the Rebuttal Expert Report of Mark Evanier.

16. Attached hereto as **Exhibit 15** is a coversheet in place of the Expert Report of Paul Levitz dated January 27, 2023, which was designated "Confidential" by Marvel and is being filed under seal.

17. Attached hereto as **Exhibit 16** is a true and correct copy of excerpts (pages 1-2, 117-121) from the Transcript of Nanci Solo's October 28, 2022 Deposition.

18. Attached hereto as **Exhibit 17** is a true and correct copy of excerpts (pages 1-3, 17, 24-25, 27, 29-32, 34-35, 39-40, 51-52, 59-60, 83-90, 92, 110, 138-139, 142-143, 239-241, 244, 246, 248-265, 272-276, 278-279, 289-298, 301-303, 307-312, 317-322) from the Transcript of Roy William Thomas Jr.'s January 20, 2023 Deposition.

19. Attached hereto as **Exhibit 18** is a true and correct copy of correspondence sent by Roy Thomas dated October 28, 1965.

20. Attached hereto as **Exhibit 19** is a true and correct copy of excerpts (cover and pages 1, 6-8) of a Roy Thomas interview published in *Alter Ego* No. 50 dated July 2005.

21. Attached hereto as **Exhibit 20** is a true and correct copy of excerpts (pages 1-3, 50-53, 57-59, 73-74, 154-156, 160-162, 196) from the Transcript of Mark Evanier's March 3, 2023 Deposition.

22. Attached hereto as **Exhibit 21** is a true and correct copy of excerpts (pages 1-6, 29-30, 41, 61-64, 91-93, 97) from the Transcript of James F. Steranko's February 10, 2023 Deposition.

23. Attached hereto as **Exhibit 22** is a true and correct copy of excerpts (pages 1-3, 155-156, 252-257, 259, 266-271, 286-288, 303) from the Transcript of Lawrence D. Lieber's October 25, 2022 Deposition.

24. Attached hereto as **Exhibit 23** is a true and correct copy of excerpts (pages 1-4, 160, 166-168) from the Transcript of Mark S. Ditko's February 8, 2023 Deposition.

25. Attached hereto as **Exhibit 24** is a true and correct copy of excerpts (pages 1-3, 14, 37, 49-52, 79, 89, 97, 104-107, 112-113, 123-124, 138-140) from the Transcript of Paul Levitz's March 3, 2023 Deposition.

26. Attached hereto as **Exhibit 25** is a true and correct copy of correspondence sent by

Steve Ditko.

27. Attached hereto as **Exhibit 26** is a true and correct copy of excerpts (cover and introductory pages and pages 82-83) from the *Doctor Strange Master of The Mystic Arts* by Stan Lee.

28. Attached hereto as **Exhibit 27** is a true and correct copy of correspondence from Steve Ditko to Mark Ditko.

29. Attached hereto as **Exhibit 28** is a true and correct copy of correspondence sent by Stan Lee dated August 18, 1999.

30. Attached hereto as **Exhibit 29** is a true and correct copy of a May 1990 essay by Steve Ditko.

31. Attached hereto as **Exhibit 30** is a true and correct copy of correspondence from Stan Lee to Jerry Bails dated January 9, 1963.

32. Attached hereto as **Exhibit 31** is a true and correct copy of *Undervalued Spotlight #386* by Walter Durajlija dated March 20, 2018 accessed at <https://www.comicbookdaily.com/collecting-community/undervalued/undervalued-spotlight-386/>.

33. Attached hereto as **Exhibit 32** is a true and correct copy of correspondence from Jim Shooter to Randy Schueller dated August 3, 1982.

34. Attached hereto as **Exhibit 33** is a true and correct copy of correspondence from Steve Ditko to Patrick S. Ditko dated August 6, 1946.

35. Attached hereto as **Exhibit 34** is a true and correct copy of *Comic Book Urban Legends Revealed Extra: Randy Schueller's Brush With Comic History* by Brian Cronin dated May 16, 2007 accessed at <https://www.cbr.com/comic-book-urban-legends-revealed-extra-randy-schuellers-brush-with-comic-history/>.

36. Attached hereto as **Exhibit 35** is a true and correct copy of excerpts (pages DITKO-

0189-0194, DITKO-0198-0200, DITKO-0207-0210, DITKO-0215-0218) of *A Mini-History* by Steve Ditko.

37. Attached hereto as **Exhibit 36** is a true and correct copy of excerpts (pages 1-2, 7) from Marvel Characters, Inc.'s Responses and Objections to Defendant Ditko's First Set of Requests for Admission.

38. Attached hereto as **Exhibit 37** is a true and correct copy of Art Releases signed by Marv Wolfman dated 1979 and 1980, respectively.

39. Attached hereto as **Exhibit 38** is a coversheet in place of an agreement signed by Randy Schueller dated August 9, 1982, which was designated "Confidential" by Marvel and is being filed under seal.

40. Attached hereto as **Exhibit 39** is a coversheet in place of an agreement purportedly signed by Steve Ditko dated January 26, 1979.

41. Attached hereto as **Exhibit 40** is a true and correct copy of a Certificate of Registration of a Claim to Copyright for *Amazing Fantasy* Vol. 1, No. 15 dated June 12, 1962 and a Certificate of Renewal Registration for *Amazing Fantasy* Vol. 1, No. 15 dated November 20, 1990.

42. Attached hereto as **Exhibit 41** is a true and correct copy of a Certificate of Registration of a Claim to Copyright for *Amazing Spider-Man* Vol. 1, No. 1 dated December 19, 1962 and a Certificate of Renewal Registration for *Amazing Spider-Man* Vol. 1, No. 1 dated November 20, 1990.

43. Attached hereto as **Exhibit 42** is a true and correct copy of a Certificate of Registration of a Claim to Copyright for *Strange Tales* Vol. 1, No. 110 dated April 18, 1963 and a Certificate of Renewal Registration for *Strange Tales* Vol. 1, No. 110 dated December 27, 1991.

44. Attached hereto as **Exhibit 43** is a coversheet in place of a Writers and Artists Agreement signed by Eugene Colan dated March 22, 1975, which was designated "Confidential"

by Marvel and is being filed under seal.

45. Attached hereto as **Exhibit 44** is a coversheet in place of an agreement signed by Roy Thomas dated September 1, 1974, which was designated “Confidential” by Marvel and is being filed under seal.

46. Attached hereto as **Exhibit 45** is a coversheet in place of checks from Marvel Comics Group made payable to Richard Ayers dated from February 1, 1974 to July 4, 1975, which was designated “Confidential” by Marvel and is being filed under seal.

47. Attached hereto as **Exhibit 46** is a true and correct copy of correspondence from Charles R. Brainard to Michael E. Schultz dated October 4, 1967.

48. Attached hereto as **Exhibit 47** is a true and correct copy of correspondence from Lancer Books Inc. to Don Rico dated December 15, 1966.

49. Attached hereto as **Exhibit 48** is a true and correct copy of a Certificate of Registration of a Claim for Copyright and Certificate of Registration for *Amazing Spider-Man Annual* Vol. 1, No. 1 dated August 31, 1964 and December 15, 1992, respectively.

50. Attached hereto as **Exhibit 49** is a true and correct copy of excerpts (cover and page 1) of *Strange Tales* No. 110.

51. Attached hereto as **Exhibit 50** is a true and correct copy of excerpts (pages DETTWILER-0014, DETTWILER-0044-0058) of Donald L. Heck’s Account Book for Earnings.

52. Attached hereto as **Exhibit 51** is a true and correct copy of a check from Marvel Comics Group made payable to Stephen Gerber dated from June 1, 1973.

53. Attached hereto as **Exhibit 52** is a true and correct copy of a Writers Agreement between Marvel Comics Group and Stephen Gerber dated October 7, 1977.

54. Attached hereto as **Exhibit 53** is a true and correct copy of a Writers Agreement between Marvel Comics Group and Roy Thomas dated August 27, 1976.

55. Attached hereto as **Exhibit 54** is a true and correct copy of an agreement between Marvel Comics Group and Roy Thomas dated March 7, 1977 and correspondence concerning the agreement dated February 24, 1978.

56. Attached hereto as **Exhibit 55** is a true and correct copy of excerpts (pages 1-5, 62-63) from the Transcript of Stan Lee's March 13, 2013 Deposition.

57. Attached hereto as **Exhibit 56** is a true and correct copy of excerpts (pages 71-75, 82-83, 89-92, 94-95) from the Transcript of Stan Lee's March 14, 2013 Deposition.

58. Attached hereto as **Exhibit 57** is a true and correct copy of undated correspondence between David Currie and Steve Ditko.

59. Attached hereto as **Exhibit 58** is a true and correct copy of correspondence between David Currie and Steve Ditko dated June 19, 2016.

60. Attached hereto as **Exhibit 59** is a true and correct copy of excerpts (pages 1-3, 61-65) from the Transcript of Patrick Ditko's February 14, 2023 Deposition.

61. Attached hereto as **Exhibit 60** is a true and correct copy of the first *Spider-Man* story published in *Amazing Fantasy* Vol. 1, No. 15.

62. Attached hereto as **Exhibit 61** is a true and correct copy of excerpts of *Space Adventures* No. 27 published by Charlton Comics.

63. Attached hereto as **Exhibit 62** is a true and correct copy of excerpts of *Strange Tales* No. 139.

64. Attached hereto as **Exhibit 63** is a true and correct copy of excerpts of *Strange Tales* No. 126.

65. Attached hereto as **Exhibit 64** is a true and correct copy of excerpts (cover page and pages 238-247) of *Nimmer on Copyright* by Melville B. Nimmer, published in 1963.

66. Attached hereto as **Exhibit 65** is a true and correct copy of excerpts of *Out of this*

World No. 7 published by Charlton Comics.

67. Attached hereto as **Exhibit 66** is a true and correct copy of excerpts of *Strange Tales* No. 137.

68. Attached hereto as **Exhibit 67** is a true and correct copy of excerpts of *Strange Suspense Tales* No. 32 published by Charlton Comics.

69. Attached hereto as **Exhibit 68** is a true and correct copy of excerpts of *Strange Tales* No. 122.

70. Attached hereto as **Exhibit 69** is a true and correct copy of excerpts of *Strange Tales* No. 134.

71. Attached hereto as **Exhibit 70** is a true and correct copy of excerpts of *Strange Tales* No. 129.

72. Attached hereto as **Exhibit 71** is a true and correct copy of excerpts of *Amazing Spider-Man* No. 25.

73. Attached hereto as **Exhibit 72** is a true and correct copy of excerpts of *Strange Tales* No. 135.

74. Attached hereto as **Exhibit 73** is a true and correct copy of excerpts of *Amazing Spider-Man* No. 23.

75. Attached hereto as **Exhibit 74** is a true and correct copy of excerpts of *Amazing Spider-Man* No. 37.

76. Attached hereto as **Exhibit 75** is a true and correct copy of excerpts of *Strange Suspense Stories* No. 33 published by Charlton Comics.

77. Attached hereto as **Exhibit 76** is a true and correct copy of excerpts of *Amazing Spider-Man* No. 9.

78. Attached hereto as **Exhibit 77** is a true and correct copy of excerpts of *Strange*

Suspense Stories No. 48 published by Charlton Comics.

79. Attached hereto as **Exhibit 78** is a true and correct copy of excerpts of *Amazing Spider-Man* No. 1.

80. Attached hereto as **Exhibit 79** is a true and correct copy of excerpts of *Out of this World* No. 6 published by Charlton Comics.

81. Attached hereto as **Exhibit 80** is a true and correct copy of an invoice from Marvel Worldwide, Inc. to Ditko from April 2015.

82. Attached hereto as **Exhibit 81** is a true and correct copy of an invoice from Marvel Worldwide, Inc. to Ditko from 2017.

83. Attached hereto as **Exhibit 82** is a true and correct copy of an interview of Stan Lee in *Super Heroes With Super Problems*, New York Herald Tribune, published January 9, 1966.

84. Attached hereto as **Exhibit 83** is a true and correct copy of an interview of Stan Lee in *Super Heroes With Super Problems*, New York Herald Tribune, published January 9, 1966, accessed online at <http://www.hembeck.com/More/HeraldTribuneArticles/MarvelArticle.htm>.

85. Attached hereto as **Exhibit 84** is a true and correct copy of a Dunn & Bradstreet credit report of Magazine Management Company dated June 28, 1951.

86. Attached hereto as **Exhibit 85** is a true and correct copy of excerpts of *The Secret History of Marvel Comics* (2013) by Blake Bell and Dr. Michael J. Vassallo.

87. Attached hereto as **Exhibit 86** is a true and correct copy of a series of photographs of spiderweb engraved wood blocks created by Ditko.

88. Attached hereto as **Exhibit 87** is a true and correct copy of excerpts of *Tsk Tsk* (2000) by Steve Ditko.

89. Attached hereto as **Exhibit 88** is a coversheet in place of an agreement dated March 20, 2006 between Silver Creek Pictures, Inc. and POW! Entertainment, Inc., which was designated

“Confidential” by Marvel and is being filed under seal.

90. Attached hereto as **Exhibit 89** is a coversheet in place of an agreement dated May 2, 2008 between Silver Creek Pictures, Inc. and POW! Entertainment, Inc., which was designated “Confidential” by Marvel and is being filed under seal

91. Attached hereto as **Exhibit 90** is a coversheet in place of a stock purchase agreement dated as of December 31, 2009 between Catalyst Investments, LLC and POW! Entertainment, Inc., which was designated “Confidential” by Marvel and is being filed under seal.

92. Attached hereto as **Exhibit 91** is a coversheet in place of an agreement dated as of December 18, 1009 between Silver Creek Pictures, Inc. and POW! Entertainment, Inc., which was designated “Confidential” by Marvel and is being filed under seal.

93. Attached hereto as **Exhibit 92** is a coversheet in place of an affidavit of Stan Lee dated June 11, 2007, which was designated “Confidential” by Marvel and is being filed under seal.

94. Attached hereto as **Exhibit 93** is a coversheet in place of an agreement dated June 11, 2007 between Marvel Entertainment, Inc. and Stan Lee, which was designated “Confidential” by Marvel and is being filed under seal.

95. Attached hereto as **Exhibit 94** is a true and correct copy of the Declaration of Donald S. Engel and attached exhibits in *Gerber v. Cadence Industries Corp.*, No. 80-3840-DVK (C.D. Cal. 1980) dated November 12, 1980.

96. Attached hereto as **Exhibit 95** is a true and correct copy of excerpts (pages 1-3, 23-24, 31-33, 35-36, 41, 56-59, 62, 91-92, 105, 136-138, 140-142, 174-177, 203-204, 215-216, 234-235, 245-248) from the Transcript of Mark Evanier’s December 6, 2010 Deposition.

97. Attached hereto as **Exhibit 96** is a true and correct copy an interview of Stan Lee dated August 12, 1968.

98. Attached hereto as **Exhibit 97** is a true and correct copy of excerpts from *Daredevil*

Annual No. 1.

99. Attached hereto as **Exhibit 98** is a coversheet in place of checks from Marvel Comics Group made payable to Jack Kirby dated May 5, 1986, which was designated “Confidential” by Marvel and is being filed under seal.

100. Attached hereto as **Exhibit 99** is a coversheet in place of a contract between Marvel Characters, Inc. and Roy Thomas dated March 25, 2020, which was designated “Confidential” by Marvel and is being filed under seal.

101. Attached hereto as **Exhibit 100** is a true and correct copy of *Hutson v. Notorious B.I.G., LLC*, 2015 U.S. Dist. LEXIS 170733 (S.D.N.Y. Dec. 21, 2015), which is not available on Westlaw.

102. Attached hereto as **Exhibit 101** is a true and correct copy of *Fifty-Six Hope Rd. Music Ltd.*, 2010 U.S. Dist. LEXIS 94500 (S.D.N.Y. September 10, 2010), which is not available on Westlaw.

103. Attached hereto as **Exhibit 102** is a true and correct copy of excerpts (cover and pages 8-9) of an interview of Flo Steinberg in 1984 published in *Alter Ego* No. 153.

104. Attached hereto as **Exhibit 103** is a true and correct copy of excerpts of *Konga* No. 6 (1962) published by Charlton Comics and co-authored by Steve Ditko.

105. Attached hereto as **Exhibit 104** is a true and correct copy of *Konga* No. 11 (1963) published by Charlton Comics and co-authored by Steve Ditko.

106. Attached hereto as **Exhibit 105** is a true and correct copy of *Gorgo* No. 13 (1963) published by Charlton Comics and co-authored by Steve Ditko.

107. Attached hereto as **Exhibit 106** is a true and correct copy of *The Return of Gorgo* No. 3 (1964) published by Charlton Comics and co-authored by Steve Ditko.

108. Attached hereto as **Exhibit 107** is a true and correct copy of *Strange Suspense*

Stories No. 76 (1965) published by Charlton Comics and co-authored by Steve Ditko.

109. Attached hereto as **Exhibit 108** is a true and correct copy of *Captain Atom No. 80 (1966)* published by Charlton Comics and co-authored by Steve Ditko.

110. Attached hereto as **Exhibit 109** is a true and correct copy of excerpts from *Strange Tales* No. 138.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and was executed on June 30, 2023, in Malibu, California.

By: /s/ Marc Toberoff
 Marc Toberoff